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JOSEPH F. SPANIOL, JR.
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No. 84-1944

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

ALVIN HEMME, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

REPLY MEMORANDUM FOR THE UNITED STATES

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1. In our jurisdictional statement, we pointed out that the challenged transitional rule did not deprive appellees of property within the meaning of the Fifth Amendment, since the overall effect of the 1976 Tax Reform Act was to reduce appellees' estate tax bill by $655.16 (J.S. 10-11). Appellees concede that "[t]he Tax Reform Act indeed reduced the decedent's estate tax by $655.16" (Mot. to Dis. 6). They nevertheless assert, somewhat confusingly, that the transitional rule is unconstitutional because the effect of the 1976 Act was "to tax the same property (or transfer) twice" (*id.* at 6, 7).

There is no factual basis for this assertion. The single tax that was assessed and paid with respect to the property transferred by the decedent on September 28, 1976, was the estate tax paid after the decedent's death in 1978. No tax was paid with respect to that property in 1976 because the decedent elected to apply the gift tax specific exemption of $30,000. That exemption, coupled with the applicable

annual exclusions, meant that no gift tax was paid or payable with respect to the $45,000 transferred. Appellees' assertion that the same property or transfer was taxed twice is thus squarely contrary to fact.

Indeed, it was because the decedent elected to employ the $30,000 specific exemption in 1976 that the transitional rule required that the unified credit be reduced by a roughly equivalent amount when the estate tax was computed in 1978. It is true that if the decedent had *not* elected to apply the specific exemption in 1976, and if he had instead *paid* a gift tax on $30,000 of the property then transferred, his estate would have enjoyed a credit for the gift tax paid, pursuant to Section 2012, plus an undiminished unified credit pursuant to Section 2010. But failure, through one's own election, to obtain two credits is quite different from being taxed twice, or at double rates.

2. Appellees assert that "[w]hat [they] object to here" is the fact that the decedent, having made gifts on September 28, and having filed a gift tax return on September 30, "was locked into his situation, and * * * could not free himself from it," when the President, on October 4, signed the bill that Congress had sent him three weeks earlier (Mot. to Dis. 10). As appellees acknowledge (*id.* at 8), however, the gift tax return which the decedent filed on September 30 was not due until November 15, over a month after the President signed the law. It may well be that the decedent could have filed an amended gift tax return, disclaimed the $30,000 specific exemption, and paid gift tax on $30,000 of the property he transferred on September 28, thereby avoiding the transitional rule his estate now finds offensive. In any event, it was decedent's rather unusual haste in filing his gift tax return two days after he made his gifts that snapped the lock. The lock, moreover, did not greatly constrain or painfully chafe, since it allowed decedent's estate to pay

$655.16 less in estate taxes than would have been exacted under the law applicable to decedent in his "unlocked" condition earlier that year.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985